John Carre *of* Cavers, *Esq;* - - - Appellant.

Alison, Mary, Isabel, Elizabeth, *and* Esther Cairns, *Daughters of* William Cairns, *Tenant in* Wester Softlaw, *deceased*, Margaret Jeffrey *his Widow, and others*, - - - } Respondents.

The Respondents CASE.

IN the Year 1678, Sir *Thomas Carre* of *Cavers*, by a Deed of Entail, devised his Estate to a certain Series of Heirs, of whom the Appellant is descended.

Entail of the Estate of Cavers.

I. This Entail is guarded with the following prohibitory Clause: "That it shall not be lawful to the Heirs of Tailzie and Provision therein mentioned, to sell, analzie, wadset or dispone, redeemably or irredeemably, said Lands, or any "Part thereof, or to grant Infeftments of Annualrent or Liferent furth thereof, or to contract Debts, *or do any other Facts "or Deeds* civil or criminal, *whereupon said Lands may be any wise evicted, adjudged, apprized*, become caduciary or "escheat".

And this Prohibition is attended with the usual irritant and resolutive Clauses, declaring all *such* Facts and Deeds to be in themselves null and void, *ipso facto*, by Way of Exception or Reply, without the Necessity of any Declarator; and that the Person, and the Heirs Male to be procreate of his Body, who shall happen to contravene, by doing any of the Facts and Deeds *above-mentioned* directly or indirectly, shall, from thenceforth, and immediately upon the doing and committing thereof, forfeit their Right.

The above Entail contains no Clause respecting Leases to be granted by the Heirs of Entail, except the following one, of a very unusual Conception: "That notwithstanding the irritant Clause above written, it shall be lawful to the Heirs of Tailzie "to set Tacks of the Lands and others above-mentioned, the same being only for the Lifetime of the Setter, or for Fifteen "Years, without an evident Diminution of the Rental as the Lands may be set for at the Time, otherwise all such Tacks "to be null and void, and to be an Deed of Contravention of the irritant Clause above written."

By the Statute 1695, entitled, "concerning Tailzies," and by which Force and Effect is given to such Deeds, a particular Register is appointed in which Entails ought to be recorded, but the above Entail was never inserted in that Register.

1734. In the Year 1754, *John Carre*, of *Cavers*, deceased, succeeded as Heir of Entail to that Estate, comprehending among other Lands, the Farm of *Wester Softlaw*.

Lands to William Cairns.

The deceased *William Cairns*, the Respondent's Father, was then in Possession of the said Farm in virtue of a Lease of which there were a few Years then to run, and having formed a Plan to improve and to inclose that Farm, to encourage him in the Execution thereof, he obtained from the said *John Carre* another Lease, to take place at the Expiry of that which was then current.

The leasing Clause, the material one in this Deed, in Substance bears, That *John Carre* had let to *Cairns* and his Heirs the Lands of *Wester Softlaw*, for the Space of *Nineteen Years* after his Entry, thereby declared to begin at the Term of *Whitsunday* 1758, to the Houses, Grass and Pasture-ground, and to the arable Land, at the Separation from the Ground of the Crop of Corns for that Year, to be by them enjoyed during the *whole Space* above written.

On the other Part, *Cairns* obliges himself to pay the Sum of 73 *l.* 6 *s.* 8 *d.* Sterling of Rent or Tack-duty yearly, *during the whole Space* above written of that present Tack.

He is farther bound to keep the Houses in Repair *during the Space foresaid.*

Besides the leasing Clause above narrated, this Tack contains a Clause of Warranty or Warrandice in common Form. But as it was then at least doubtful whether the Possession might not be carried off by a subsequent Heir of Entail, this Clause contains an Exception from the Recourse which in such Event would have been competent against the Granter.

This Clause, with its Exception, is conceived in the following Words: "Which Tack above written, the said *John Carre* "binds and obliges him, his Heirs and Successors, to warrand to be good, valid and sufficient, free and sure to the said *William* "*Cairns*, and his Foresaids, at all Hands and against all deadly as Law will, declaring always, likeas it is hereby expressly pro- "vided and declared, that in case the said *John Carre* shall happen to depart this Life before the *Expiry* of this Tack, then "the *Obligation of Warrandice* above written shall not be extended any farther than what is consistent with the Powers he "hath by the Entail of the said Lands with respect to the granting Tacks thereof."

In Consideration of the above Lease, *Cairns* paid down a *Grassum* or Fine of 100 *l.* Sterling, and on the Faith of its Endurance proceeded to clear the Ground of Stones, and to turn the Ridges formerly covered with them into arable Land,—to inclose, and to build additional Houses upon the Farm, more commodious in Point of Situation than the Offices then built upon it.

Act of Sederunt regulating Removings.

By an Act of Sederunt of the Court of Session, it is provided, 1*mo*, "That where a Tenant is bound by his Tack to remove "without Warning *at the Issue or Determination of his Tack*, it shall be lawful for the Heritor or other Setter of the Tack, "upon such Obligation, to obtain Letters of Horning, and thereupon to charge the Tenant with Horning Forty Days pre- "ceding the Term of *Whitsunday* in the Year in which the Tack is to determine, or Forty Days preceding any other Term "of *Whitsunday* thereafter; and upon Production of such Tack or Horning, duly executed, to the Deputy Sheriff or Stewart, "or their Substitutes, of the Shire or Stewartry where the Lands lie, they are hereby authorised and required, within Six Days "after the Term of Removal appointed by the Tack, to eject such Tenant, and to deliver the Possession void to the Setter, or "those having Right from him." 2*do*, "Where the Tenant hath not obliged himself to remove without Warning, in such "a Case it shall be lawful to the Heritor or other Setter of Tack, in his Option, either to use the Order prescribed by the "Act of Parliament made in the Year 1555, intitled, *Act anent the Warning of Tenants*, and thereupon pursue a Warning "and Ejection, or to bring his Action of Removing against the Tenant before the Judge Ordinary; and such Action being "called at least Forty Days before the Term of *Whitsunday*, shall be held *as equal to a Warning* execute in Terms of the "foresaid

" foreſaid Act; and the Judge ſhall thereupon proceed to determine in the Removing, in Terms of that Act, *in the ſame* " *Manner as if a Warning had been executed in Terms of the foreſaid Act of Parliament.*"

Cairns, the *Leſſee*, died in 1764;—the ſaid *John Carre* of *Cavers*, the *Leſſor*, died in 1766.

The Appellant ſucceeded to him as Heir of Entail, as well as univerſal Repreſentative, and levied from the Reſpondents, as repreſenting *Cairns*, the Rents of the Farm of *Weſter Seſſlaw* down to *Whitſunday* 1772.

Towards the End of that Year, the Appellant ſeems to have formed a Scheme to remove the Reſpondents from their Poſſeſſion.

Appellant's Action.

For this Purpoſe, he brought an Action before the Sheriff Depute of *Roxburghſhire*, founding on the above quoted Act of Sederunt, and on the above-recited Clauſe in the Entail, by which it was ſaid, in the *Summons* or *Declaration*, the Power of an Heir to grant a Leaſe was limited to the Lifetime *allenarly* (i. e. *only*) of the Grantor, or to Fifteen Years, without Diminution of the Rental; and from theſe Premiſes it was concluded the Reſpondents ſhould be decerned to remove at the Term of *Whitſunday* then next (*i. e.* 15th *May* 1773).

It appears from the Proceedings before the Sheriff, that the Deed of Entail was not then in the Poſſeſſion of the Appellant, nor any Extract of it to be found in his Father's Repoſitories. This Circumſtance gave Occaſion to a Judgment abſoilzing
30th Dec. 1772. (acquitting) the Reſpondents: But an Extract of the Deed of Entail having been recovered from the Books of Council and
Feb. 2d 1773. Seſſion, where the Original had been recorded for Preſervation, the Sheriff pronounced the following Interlocutor: " Having " conſidered the Repreſentation, and Extract of the Bond of Tailzie therewith produced, with the Anſwers for the De- " fenders, finds the Heir of Entail in Poſſeſſion of the Eſtate of *Cavers Carre*, by the Condition of the Entail, is debarred " from letting Tacks for a longer Space than his own Life, or the Term of Fifteen Years; and therefore alters the Interlo- " cutor of the 30th *December* laſt, and decerns in the Removing."

Before extracting, this Interlocutor was brought under Review of the Court of Seſſion by Bill of Advocation (*Certiorari*), and after ſome Proceedings, that Court remitted the Cauſe *ſimpliciter* to the Sheriff.

When it returned to the Sheriff, the Reſpondents were allowed to be further heard; but after ſome Proceedings, unneceſſary to be here recited, the Sheriff again gave Judgment in Terms of the Appellant's Libel (Declaration), and allowed Decreet to be extracted.

The Reſpondents were adviſed to bring the Matter again under Review of the Court of Seſſion, by Bill of Suſpenſion, a Form competent after Decree is extracted.

8th July 1773. In conſequence of this, the Cauſe was brought before Lord *Kaims* Ordinary, who, before entering into the Merits of it, appointed a Condeſcendence of the Improvements the Reſpondents had made on the Farm, which was accordingly given in; and being anſwered by the Appellant, a Proof was brought by both Parties of their reſpective Allegations.

The Cauſe being thus prepared, Memorials were given in by the Parties.

In the Memorial for the Reſpondents, it was contended, That the above-recited Clauſe in the Deed of Entail did not amount to a Prohibition againſt granting a Leaſe for the Space of Nineteen Years, where there was no Diminution of the Rental; but it was only meant to prohibit the granting a Leaſe under the Rental, or with ſuch Diminution. But ſuppoſing the Clauſe to amount to a Prohibition, it could have no Effect to prevent the Tenant in Tail from the ordinary Exerciſe of Property, by granting Leaſes for Nineteen Years, ſince there was no Clauſe in the Deed which irritated or voided his Right to the Eſtate for acting in this Manner:—That there was indeed a Reference in ſaid Clauſe to a ſuppoſed irritant Clauſe; but as no ſuch irritant Clauſe exiſted reſpecting the granting of Leaſes, the Prohibition could operate nothing.

For the Appellant it was contended, That the Entailer's Intention to irritate and reſolve the Heir of Entail's Right, in caſe he granted Leaſes of longer Endurance than Fifteen Years, was clear, and that the Words were ſufficient to create an Irritancy.

It was next argued for the Reſpondents, That admitting ſuch Prohibition to be an Irritancy, it could not operate againſt them, as the Entail was never recorded in the Regiſter of Tailzies, a Form without which it could not be effectual againſt Leſſees, or other onerous Creditors.

The Relevancy of this Argument was not diſputed; but it was pleaded on the Appellant's Part, That the Effect of the above-recited Exception in the Clauſe of Warrandice contained in the Leaſe, was to reſtrict the Duration of the Leaſe to Fifteen Years.

To this an obvious Anſwer occurred: The Right of Poſſeſſion conveyed, and the Obligation to warrant that Poſſeſſion, were totally different in their Nature and in their Effects, and contained in different Clauſes of the Leaſe.

It was further maintained for the Reſpondents, That the Action of Removing, and Decree of the Sheriff in conſequence of it, were improper and inept, in reſpect the Act of Sederunt above recited gave no Authority to remove a Tenant previous to the Iſh or Expiry of the Leaſe; whereas the Sheriff's Decree removed the Tenant during its Currency, and at a Term different from what the Leaſe itſelf declared to be the Iſh or Expiry, in the very Clauſe founded on by the Appellant.

Beſides, it was of the Nature of a Declarator of Irritancy or Reduction of a real Right for Defect of Power, which was only competent before the Court of Seſſion.

The Appellant replied, That the Leaſe being reſolvable in caſe it exceeded the Granter's Power as limited by the Deed of Entail, it was a *petitio principii* to ſay the Leaſe was current; it was a Leaſe determinable upon the Exiſtence of a Condition which had exiſted, and the Exiſtence of the Condition fixing the Iſh or Expiry, it was properly founded on the Act of *Sederunt*, and competent before the Sheriff, though it incidentally involved a Queſtion of Right.

The Reſpondents founded alſo upon the Appellant levying the Rents from *Whitſunday* 1766, till *Whitſunday* 1772, as an Act approving and homologating the granting of ſaid Leaſe.

And the Appellant maintained, That this Conduct could not be regarded as an Act of Homologation, the Leſſee having Power to grant a Leaſe for Fifteen Years, during which Period only, the Appellant had levied the Rents.

The laſt Queſtion agitated between the Parties was, How far a Decree to remove at *Whitſunday* could be available to the Appellant, the Terms of Removal in the Leaſe being different, *viz.* *Whitſunday* as to the Graſs and Houſes, and the Separation of the Cropt as to the arable Land. And the Reſpondents maintained no Decree of Removal could be pronounced contrary to the expreſs Terms of the Leaſe.

An Argument was likewiſe raiſed upon the Improvements and Incloſures made, and Houſes built on the Farm by *Cairns*, as done upon the Faith his Leaſe was to endure for 19 Years. To which the Appellant rejoined, That whatever had been done, accrued to the Proprietor; and that they could not be ſuppoſed to have been made in Conſideration of a farther Poſſeſſion for Three Years only.

Upon

Upon this Debate, The Court of Seſſion gave Judgment as follows:

9th Jan. 1774. ult Interlocutor appealed from.

"Upon Report of Lord *Kames*, and having advifed the Informations given in for the Parties, the Lords ſuſtain the Reaſons of Suſpenſion, and ſuſpend the Letters *ſimpliciter*; and decern."

The Appellant prayed by Petition for an Alteration of this Judgment.

In this Petition the Appellant inſiſted upon the alledged Prohibition, and ſuppoſed Irritancy in the Entail, 1678.

2dly, Upon the Exception from the Clauſe of Warrandice in the Leaſe, he argued, That a Limitation of the Leaſe to 15 Years Endurance was clearly intended, and that ſuch Exception implied, and was equal to, a Reſtriction of the Leaſe to that Period.

The Reſpondents put in Anſwers, and maintained, That the Endurance of the Leaſe muſt be regulated by the leaſing Clauſe, which conveyed the Right of Poſſeſſion expreſsly for 19 Years.

The Term of Fifteen Years was nowhere mentioned in the Leaſe; and as to the Exception from the Warrandice, referring to the Powers in the Entail, it could not regulate the Endurance of the Leaſe, but only the Extent of the Recourſe, in Caſe of Eviction.

The only Event provided for by the Exception from the Warranty, was the Recourſe competent in Caſe of Eviction. It was therefore to be held the only one in View of the Parties at the Time; and as to remote Conſequences, they either were not in View, or, if in View, had not been provided againſt; and not having happened, could at no Rate enter into the Queſtion.

Feb. 22d 1774. ult Interlocutor appealed from.

Upon adviſing the abovementioned Petition and Anſwers, the Court adhered to their former Judgment, with only one diſſenting Voice.

The Appellant has thought proper to appeal againſt theſe Judgments of the Court of Seſſion; but the Reſpondents hope they will be affirmed with Coſts, for the following, among other

REASONS:

I. An Entail, by the Law of *Scotland*, is held to be *ſtricti Juris*, and no Limitation of a Tenant in Tail's Right can be inferred by Implication, nor will a Prohibition without a Clauſe declaring the Deed of Contravention null, and alſo voiding or reſolving the Contravener's Right to the Eſtate, be ſufficient to reſtrain the Exerciſe of any Power competent to a Tenant in Fee Simple; and farther, though a prohibitory Clauſe againſt leaſing ſhould be ſupported by irritant and reſolutive Clauſes, theſe would not be good againſt Leſſees, unleſs ſuch Entail had been produced and recorded in Terms of the Statute 1685.

II. A Leſſee's Right to continue in Poſſeſſion till the *Iſh* or Expiry of the Leaſe, ariſes from the Grant contained in the leaſing Clauſe and from the Poſſeſſion following on it, and is totally diſtinct and different from, as well as independent of the Clauſe of Warranty, or Right thence ariſing; that laſt-mentioned Clauſe, conferring no ſuch Right to poſſeſs, but only a Ground of Action for Damages, in caſe of Eviction, againſt the Granter and his Heirs perſonally. An Exception therefore from ſuch Clauſe of Warranty in a certain Event can have no Effect to limit the Endurance of a Leaſe in which ſuch Exception is contained.

III. So ſtanding the Law of *Scotland*, the Entail 1678 not having been recorded in Terms of the Statute 1685, cannot be good againſt the Reſpondents, though it contained proper prohibitory, irritant, and reſolutive Clauſes againſt leaſing for Nineteen Years: And the Entail containing no ſuch direct Clauſes, at leaſt none reſolving the Contravener's Right, the late Mr. *Carre*'s Want of Power cannot be inferred by Implication.

IV. As there is no Exception in the leaſing Clauſe, by which the Endurance of the Leaſe in queſtion is reſtrained or declared to be for leſs than Nineteen Years, nor any Declaration, that the Iſh or Expiry of it ſhould take place at the End of Fifteen Years from the Terms of Entry, the Exception from the abovementioned Clauſe of Warrandice can have no ſuch Operation, or to limit ſaid Endurance of the Right to poſſeſs.—It only ſaves from Recourſe in an Event which has not taken place.

V. Neither can the Forfeiture of the Leſſee's Right be inferred from preſumed Intention, nor are there Grounds for preſuming ſuch Intention in the Event which has happened. The Leſſor meant to confer his Right as ſupported by Law, and the Leſſee has by Law a Right to hold it.

VI. On the Suppoſition that the Leaſe is reduceable on Account of Defect of Power in the Granter, the Action of removing was not competent before the Sheriff, nor upon the Act of Sederunt of the Court of Seſſion, on which it was laid; for the Sheriff cannot judge in Reductions of real Rights, nor does the Act impower him to judge in *Removings*, during the Currency of a Leaſe, and admitting that the Action might have been competently brought, the Libel or Declaration was improperly laid, and the Sheriff's Judgment on it muſt be null, ſince it decrees the Tenant to remove at a Term, *viz. Whitſunday*, different from the conventional Terms in the Leaſe, which are *Whitſunday* from the Graſs, and the *Time of the* Separation of the Cropt from the arable Lands.

VII. Every other Objection to the Reſpondent's Right ſuppoſed good, the Appellant is barred from inſiſting on them, having homologated their Right by receiving Rent from the Reſpondents after his Father's Death, as Leſſees poſſeſſing under ſaid Leaſe. And the preſent Attempt to ouſt them is moſt cruel and unjuſt, after a conſiderable Expenditure made by their Father on Improvements, Incloſure, and Houſes.

JA. MONTGOMERY.
ALEX. MURRAY.

Die Veneris 6°. Maij 1774.

Ordered and Adjudg'd That the Appeal be Diſmiſs'd and that the Interlocr. therein Complain'd of be affirm'd with £100 Coſts.

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John Carre *of* Cavers, *Esq;* - Appellant.

Alison, Mary, Isabel, Elizabeth, *and* Esther Cairns, *Daughters of* William Cairns, *deceased*, Margaret Jeffrey *his Widow, and others*, - - - - } Respondents.

The Respondents CASE.

To be heard at the Bar of the House of Lords, on *Tuesday* the 26th of *April* 1774.